

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**



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Order Instituting Investigation on the  
Commission's Own Motion into the Rates,  
Operations, Practices, Services and Facilities  
of Southern California Edison Company  
and San Diego Gas and Electric Company  
Associated with the San Onofre Nuclear  
Generating Station Units 2 and 3.

And Related Matters.

Investigation 12-10-013  
(Filed October 25, 2012)

Application 13-01-016  
Application 13-03-005  
Application 13-03-013  
Application 13-03-014

**INITIAL BRIEF OF  
THE CALIFORNIA STATE UNIVERSITY (CORRECTED)**

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In accordance with the briefing schedule set by the Joint Ruling of Assigned Commissioner Sandoval and Administrative Law Judge ("ALJ") Bushey issued on May 9, 2016 ("Joint Ruling"),<sup>1</sup> the California State University ("CSU") respectfully submits this initial brief.<sup>2</sup>

**I. INTRODUCTION**

The Joint Ruling reopens the record to review the SONGS Settlement Agreement ("Settlement") in light of *ex parte* communications that were not disclosed until after the Settlement had been approved.<sup>3</sup>

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<sup>1</sup> *Joint Ruling of Assigned Commissioner and Administrative Law Judge Reopening Record, Imposing Ex Parte Contact Ban, Consolidating Advice Letters, and Setting Briefing Schedule.*

<sup>2</sup> The previously filed version of this brief had not been fully vetted, contained statements that do not accurately reflect CSU's positions and therefore this corrected version supersedes and replaces the previously filed version in its entirety.

<sup>3</sup> The Commission approved the Settlement, which resolved rate recovery issues related to the premature shutdown of the San Onofre Nuclear Generating Station ("SONGS"), in Decision ("D.") 14-11-040, which was issued on November 25, 2014.

The main focus of the Joint Ruling is the series of late-reported *ex parte* communications between Southern California Edison Company (“SCE”) and former Commissioner and President Michael Peevey, and between SCE and other Commission decision-makers, which resulted in SCE being fined for ten violations of the Commission’s *ex parte* rules and two violations of the Commission’s ethics rules.<sup>4</sup> The clear intent of the Joint Ruling is to expunge any taint on the Commission’s approval of the Settlement associated with SCE’s late-reported *ex parte* communications, and to assure the parties and the public at large that the Settlement Agreement will be re-evaluated based solely on the record.

The Joint Ruling bans all further *ex parte* communications, temporarily suspends the Settling Parties’ obligation to support the Settlement, and directs parties to submit briefs that assess whether the Settlement meets the Commission’s standards for approving settlement agreements and propose any further procedural actions they believe are warranted. The Joint Ruling also directs parties to include in their briefs a separate analysis of whether the Green House Gas Research and Reduction Program (“GHG R&R Program”) portion of the Settlement meets the Commission’s standards for approving settlement agreements

The GHG R&R Program portion of the Settlement, which was added to the Settlement shortly before it was approved, was the subject of several private communications with President Peevey and his advisors that took place over the course of several months while the Settlement was pending Commission approval.

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<sup>4</sup> SCE failed to disclose a key settlement-related *ex parte* communication between SCE’s then-Executive Vice President and former General Counsel Stephen Pickett and President Peevey until February 9, 2015, or nearly two years after the fact. In response to subsequent ALJ rulings, SCE provided information about additional settlement-related *ex parte* communications with President Peevey and other Commission decision-makers in filings made on April 15, 2015 and June 26, 2015. The Commission imposed fines and other sanctions for SCE’s rule violations in D.15-12-016.

In CSU's assessment, SCE's failure to disclose *ex parte* communications about the Program in a timely and complete manner violated the Commission's *ex parte* rules and unfairly disadvantaged CSU. SCE has already been fined for its violations of the Commission's *ex parte* and ethics rules. Yet it is incumbent on the Commission to remedy the harm to CSU resulting from SCE's secret consultations with President Peevey and his advisors concerning the scope of the GHG R&R Program and its shareholder funding mechanism. The Commission also has a duty to ensure the program funds are allocated in a manner that is most likely to further the program's goals.

To both ends, CSU recommends that the Commission modify the Settlement regarding the GHG R&R Program's shareholder funding. While CSU believes a 50/50 allocation of program funds between the University of California, Los Angeles ("UC") and CSU (collectively, the "Universities") would be fair and in the public interest, it is not asking the Commission to decide that issue. Instead, CSU recommends the Commission: (1) suspend the SCE and San Diego Gas & Electric Company ("SDG&E") advice letter filings to implement the GHG R&R Program; (2) order SCE and SDG&E (collectively, the "Utilities") to meet and confer with the Universities regarding the allocation of program funding between UC and CSU, including the possible exploration of a competitive bid process that could be adopted; and (3) order the Utilities to submit a report on the outcome of their consultations with the Universities by a date certain. If the Utilities and the Universities present the Commission with a joint recommendation on funding allocation in the report, the Commission should modify the Settlement to allocate the program funds between UC and CSU per the joint recommendation. Only if the Utilities and the Universities fail to produce a joint recommendation does CSU

request the Commission decide the equitable allocation of program funding between UC and CSU.

## **II. GREENHOUSE GAS RESEARCH AND REDUCTION PROGRAM**

When the SONGS Settlement Agreement was first submitted to the Commission for approval, it made no mention of the GHG R&R Program. In a joint ruling issued on September 5, 2014, the Commissioner and two ALJs assigned to the proceeding at the time identified “certain changes” that the Settling Parties must make to the settlement terms “before we can recommend that the full Commission approve the settlement.”<sup>5</sup> Among the requested changes to the Settlement was the addition of a provision “which will result in a multi-year project, undertaken by the University of California, funded by shareholder dollars, to spur immediate practical, technical development of devices and methodologies to reduce [CO<sub>2</sub>] emissions at existing and future California power plants tasked to replace the lost SONGS generation.”<sup>6</sup> The ruling also specified several “basic criteria” that the requested provision should contain, including commitments by SCE and SDG&E to work with “the University of California Energy Institute (or other appropriate existing UC entity engaged in energy technology development)” to create the program, and to fund the program with “up to \$5 million annually (e.g., \$4 million from Edison, \$1 million from SDG&E) from shareholder funds” for up to five years.<sup>7</sup>

On September 24, 2014, the Settling Parties submitted an Amendment to the proposed settlement that added the requested provision for a shareholder-funded GHG R&R Program, including the “basic criteria” specified in the September 5 Ruling. In adopting the GHG R&R

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<sup>5</sup> *Assigned Commissioner and Administrative Law Judges’ Ruling Requesting Settling Parties to Adopt Modifications to Proposed Settlement Agreement*, at 2.

<sup>6</sup> *Id.* at 9.

<sup>7</sup> *Id.* at 10.

Program portion of the Settlement, the Commission reasoned, “The use of alternative sources of energy, including gas-fired generation, to replace lost nuclear power from SONGS, has had an adverse impact on air quality in the service territories of the Utilities in addition to global climate impacts. The impact is difficult to quantify. However, we find the proposed multi-year project to create near-term development of devices and methodologies to reduce emissions at existing and future California power plants, particularly those providing electric service in the service territories of SCE and SDG&E, is in the public interest.”<sup>8</sup>

CSU agrees with the Commission’s reasoning and, with one caveat, as discussed above, believes the Settlement’s shareholder-funded GHG R&R Program provision satisfies the Commission’s standards for adopting a settlement agreement.

### **III. STANDARDS FOR ADOPTING SETTLEMENT AGREEMENTS**

Rule 12.1(d) provides: “The Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with law, and in the public interest.”<sup>9</sup> Based on the information available when the Settlement was approved, the Commission could reasonably find that the GHG R&R Program portion of the Settlement met these standards. Subsequent to the Settlement’s adoption, however, SCE disclosed a series of *ex parte* communications with President Peevey and his advisors concerning the Program’s scope and funding. CSU was not aware of any of those communications at the time the Settlement was under consideration. Now that the Settlement is being re-evaluated, fairness and the public interest dictate that the Settlement be modified to allocate a portion of the GHG R&R Programs funding to CSU.

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<sup>8</sup> D.14-11-040 at 121-122.

<sup>9</sup> All references to rules are to the Commission’s Rules of Practice and Procedure.

#### **IV. POTENTIAL SANCTIONS**

CSU will not repeat here the litany of SCE's *ex parte* and ethics rule violations, as they have already been the subject of an investigation.<sup>10</sup> Rule 8.3(j) provides: "When the Commission determines that there has been a violation of this rule or of Rule 8.4, the Commission may impose penalties and sanctions, or make any other order, as it deems appropriate to ensure the integrity of the record and to protect the public interest." In such cases, the Commission generally applies the principles for assessing sanctions set forth in the Affiliate Rulemaking Decision (D.98-12-075):

- What harm was caused by virtue of the violation?
- What was the utility's conduct in preventing, detecting, correcting, disclosing, and rectifying the violation?
- What amount of fine or penalty will achieve the objective of deterrence based on the utility's financial resources?
- What fine/penalty or sanction has the Commission imposed under reasonably comparable factual circumstances? And,
- Under the totality of circumstances, and evaluating the harm from the perspective of the public interest, what is the appropriate fine/penalty or sanction?

##### **A. Harm**

At the time the Settlement was adopted, the GHG R&R Program appeared to have been a last-minute addition conceived and requested by the then-assigned Commissioner and ALJs to address the concerns raised by the Alliance for Nuclear Responsibility ("A4NR") in its

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<sup>10</sup> See, D.15-12-016.

comments on the Settlement.<sup>11</sup> It is now known, however, that the idea originated with President Peevey, and that he privately conveyed his idea to SCE over a year before.<sup>12</sup>

That the idea of a shareholder-funded GHG R&R Program being a part of any settlement was seeded, germinated and cultivated in this manner does not in any way detract from the program's legitimacy—indeed, it is an effective way to deal with the concerns raised by A4NR. However, SCE's *ex parte* communications “taint[ed] the regulatory process by attempting to improperly influence an individual commissioner or by attempting to influence an individual Commissioner without affording other parties notice and opportunity to do the same.”<sup>13</sup> Indeed, because all the leg work leading up to the addition of the GHG R&R Program provision to the Settlement was done in private, CSU was in the dark and was never given the opportunity to submit a proposal, much less solicit community support, for its participation in the program.<sup>14</sup>

CSU hosts several research centers and institutions with pedigrees and capabilities comparable to those of UC-affiliated institutes. CSU has at least eight campuses with one or

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<sup>11</sup> The September 5, 2014 ruling (at 8) noted that A4NR's had criticized the Settlement for failing to recognize and quantify what it viewed as being “one of the largest negative consequences arising from the SONGS shutdown: increased electricity prices and carbon dioxide (CO<sub>2</sub>) emissions.”

<sup>12</sup> As evidenced by the handwritten notes of the meeting between President Peevey and SCE's Executive Vice President that took place at the Warsaw Hotel on March 26, 2013, wherein the following item of the proposed settlement framework discussed at the meeting is recorded: “8. Environmental offset: SCE to donate \$5-10 million per year 2014-2022 to \_\_\_\_ {an agreed upon GHG, climate, or environmental academic research fund, institution, etc.}.” A copy of the notes is attached as Appendix A to SCE's Supplement to Late-Filed Notice of Ex Parte Communication, filed April 13, 2015.

<sup>13</sup> D.14-11-041, at 7.

<sup>14</sup> Faced with the *fait accompli* of the program approved as part of the Settlement being limited in scope to UC-affiliate research institutions, CSU did not believe it could change the outcome, at least not without placing the whole program at risk. So CSU decided that the best course of action was to remain silent. CSU's view of things changed, however, when it learned of SCE's previously undisclosed *ex parte* communications with President Peevey about the program. Now that the record has been reopened and the opportunity has been given for CSU to provide its assessment of the GHG R&R Program portion of the Settlement, CSU has concluded that it would be remiss if it did not propose the remedial actions described in this brief.

more existing programs or institutes capable of conducting the research contemplated in the Settlement agreement. A partial list of these centers and institutes is provided below:

- Cal Poly, San Luis Obispo houses the Electric Power Institute serves as an interface between the University and the electric power industry and is the center for electric power oriented activity at the University. The Renewable Energy Institute provides research, teaching and community service in solar and renewable energy technologies and sustainable community infrastructure. Resilient Communities Research Institute is an applied research unit devoted to advancing the quality and safety of the built environment and solar decathlon house competitions.
- California State University, Northridge hosts two institutes. The Institute for Sustainability is responsible for developing and coordinating initiatives on sustainability. The Energy Research Center promotes research and develops projects in new or alternative energy sources.
- Humboldt State University's Schatz Energy Research Center researchers work to establish clean and renewable energy technologies in our society.
- California State University, Los Angeles is the host campus for the Center for Energy and Sustainability with five areas of research, advanced materials for energy, biofuels and combustion, modeling of energy related phenomena, fuel cells and carbon sequestration.
- California State University, Bakersfield's California Energy Research Center engages in collaborative research focusing on maximizing the efficient development of multiple energy resources and is a leader in addressing issues associated with energy production and generation.

- San Diego State University hosts two energy institutes. The Sustainable Energy Center promotes excellence in renewable energy research, education and training. The Center fosters cutting edge renewable energy research. The Center for Renewable Energy and Energy Efficiency was established in 1985 to enhance the interaction and cooperative applied research with government agencies, research institutes and regional industries on subjects related to energy. Current research covers combined heat and power systems, renewable energy, role of catalysts in clean energy conversion, nanotechnology in energy conversion, molecular reaction on solid surfaces, biofuels, optimization of energy systems, combustion modelling, environmental issues related to power generation, performance monitoring and optimization of power generation facilities.
- California State University San Bernardino hosts the Center for Advanced Functional Materials. One area of research at the Center is energy harvesting materials and applications that also integrates teaching of under-represented minority students.
- Cal Poly, Pomona hosts the Smart Grid Lab current areas of research are power generation methods, energy management, power distribution and system analysis, substation design, metering, cyber security, integrated distribution management systems and modelling and simulation of electric grids.

CSU is confident that, had it been given the opportunity, it would have been successful in lobbying for a significant portion of the GHG R&R Program's funding to be allocated to CSU for use by the above-described CSU-affiliated research institutes.

## **B. SCE's Conduct**

The Commission has already noted that SCE should have been aware of the applicability and the reporting requirements of the Commission's *ex parte* rules. While SCE eventually self-

reported its *ex parte* communications, it did not do so until more than a year and a half after the communications with President Peevey occurred, by which time the harm had already been done.

### **C. Typical Sanctions and Potential Fines**

There is no pre-set fine for violating the Commission's *ex parte* rules. However, rule violations which harm the integrity of the regulatory process by "disregarding a statutory or Commission directive, regardless of the effects on the public" are "accorded a high level of severity."<sup>15</sup> The Commission's responses have included remedial measures such as prohibiting a party's future *ex parte* communications in a proceeding,<sup>16</sup> as occurred in the Commission's November 2014 decision sanctioning Pacific Gas and Electric Company ("PG&E") for violating the Commission's *ex parte* and ethics rules in connection with "judge-shopping" activities connected to the utility's 2015 Gas Transmission & Storage ("GT&S") Rate Case. In that decision, it also assessed PG&E the maximum allowable fine for each rule violation.<sup>17</sup>

### **V. PROPOSED REMEDIAL ACTIONS**

The Commission's decision in the PG&E GT&S judge-shopping case provides a useful precedent for a special remedy that CSU believes should, by analogy, be applied in the case of the GHG R&R Program portion of the Settlement. In the case of the PG&E GT&S judge-shopping matter, one of the harms resulting from PG&E's rule violations was a five-month delay in the procedural schedule. As the Commission noted, "The delay caused by PG&E's actions, and the associated inquiry and judge reassignment, has potentially real impacts on rates charged

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<sup>15</sup> See D.14-11-041 at 7 (citing and quoting D.98-12-075 at 36).

<sup>16</sup> *Id.* at 21.

<sup>17</sup> *Id.* at 15.

to customers.”<sup>18</sup> The Commission crafted a unique remedy of disallowing, for a corresponding five-month period, rate recovery of the increased revenue requirements resulting from the underlying proceeding:

In reparation for this fact, as a ratemaking remedy designed to place responsibility and cost of delay appropriately and deter such behavior by PG&E in the future, we intend to make certain ratemaking adjustments when the revenue requirements authorized in this proceeding are finalized by the Commission at the conclusion of this proceeding. This ratemaking remedy will be in the form of a disallowance, to be covered by PG&E shareholders, of a significant portion of the ratepayer costs that would have been amortized over the period between the original expected Commission decision date of March 2015 and the date that a decision is now scheduled for August 2015 in the most recent Scoping Memo issued November 13, 2014.<sup>19</sup>

The intended effect of the disallowance is to cause the costs captured in the increased revenue requirements to be borne by PG&E’s shareholders. In other words, PG&E shareholders will bear the financial impact of the utility’s rule violations.

Of course, UC does not have shareholders in the traditional sense. Moreover, UC is a national leader in environmental research of the kind contemplated to be undertaken in the GHG R&R Program, and the participation of UC in the program will enhance its effectiveness and results. At the same time, the exclusion of CSU from the program under the Settlement would be contrary to the public interest. Allowing CSU-affiliated institutions to participate in the program and receive program funding will increase the program’s effectiveness and enhance its results. CSU therefore recommends that the Commission effect a “light” version of the special remedy adopted in the PG&E GT&S judge-shopping matter, whereby a portion of the GHG R&R Program funding is shared equitably with CSU.

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<sup>18</sup> D.14-11-041 at 16.

<sup>19</sup> D.14-11-041 at 16.

CSU believes that it would be fair to allocate 50% of the GHG R&R Program's shareholder funding to CSU. However, CSU recognizes that the Commission may be hesitant to decide an allocation without more input from the affected parties. To that end, CSU recommends the Commission:

- (1) Suspend SCE's and SDG&E's advice letter filings implementing the GHG R&R Program;
- (2) Order the Utilities to meet and confer with the Universities regarding the allocation of program funding between UC and CSU, including the possible exploration of a competitive bid process that could be adopted; and
- (3) Direct the Utilities to submit a joint report on the outcome of their consultations with the Universities by a date certain.

The above-outlined process will provide the opportunity for the Utilities and the Universities to develop a joint recommendation on how best to effect both Universities' participation in the GHG R&R Program and the allocation of program funding between UC and CSU. Assuming the Utilities and the Universities can produce a joint recommendation, the Commission should modify the Settlement to allocate the program funds accordingly. If, however, a joint recommendation is not forthcoming, CSU requests the Commission decide the equitable allocation of program funds and modify the Settlement accordingly.

## **VI. CONCLUSION**

In assessing the GHG R&R Program portion of the Settlement in light of the related SCE violations of the Commission's *ex parte* rules, CSU has attempted to keep the public interest foremost developing a proposed remedy. In effect, CSU is asking the Commission to metaphorically turn back the hands of time so that CSU can have a say in the development of the GHG R&R Program's scope and receive a fair share of the program's funding. CSU believes that the remedial process it proposes for modifying the Settlement not only serves justice but will

also best serve the public interest, resulting in a modified Settlement that meets the Commission's standards for approving settlement agreements.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Gregory S.G. Klatt', is written over a horizontal line.

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